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In the Supreme Court of the United States

OCTOBER TERM, 1943

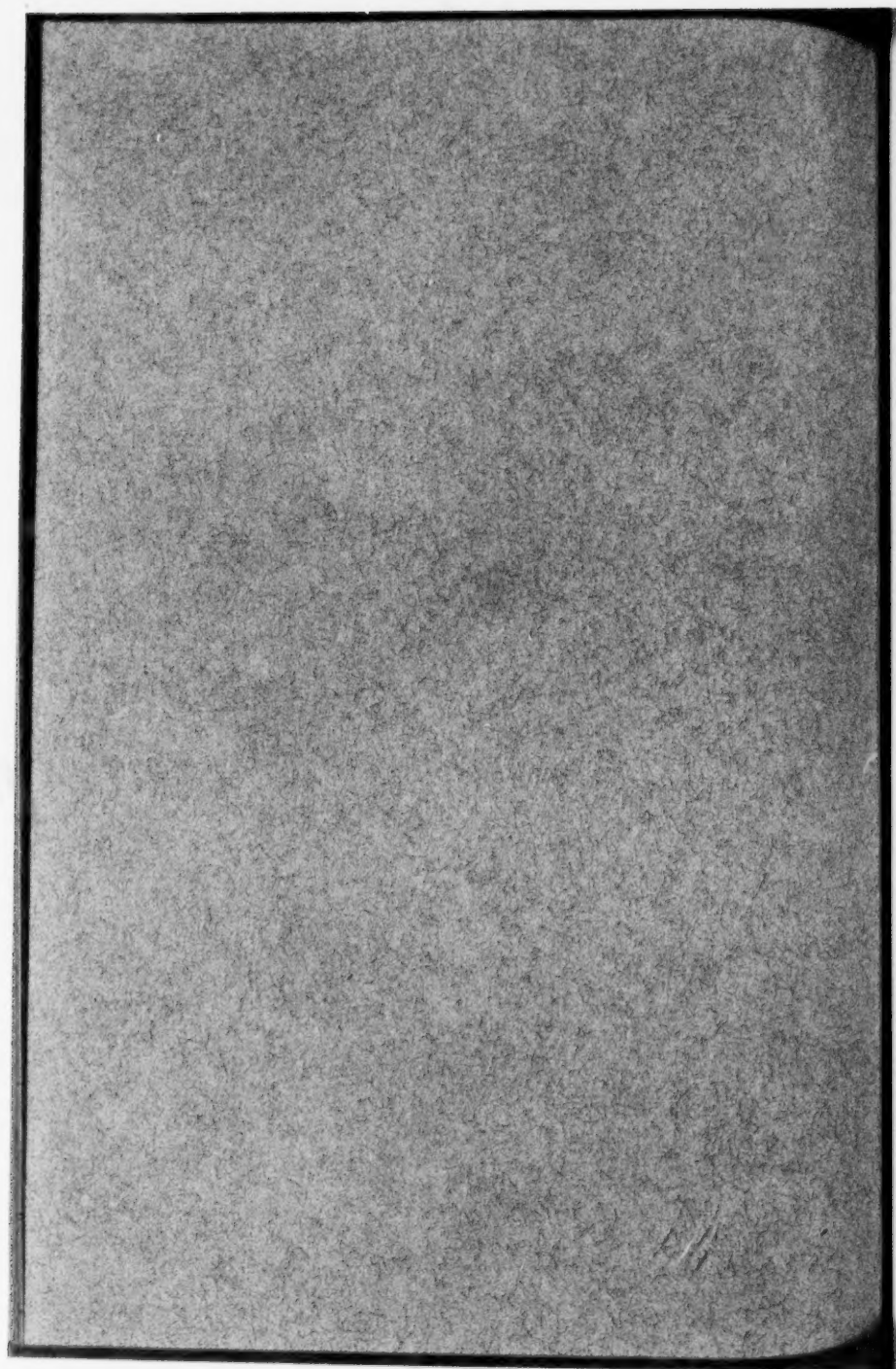
SEA GULL LUBRICANTS, INC., PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION



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OPINION BELOW

The opinion of the court below (R. 33-37) is reported at 99 C. Cl. 716 and 50 F. Supp. 230.

JURISDICTION

The judgment of the Court of Claims was entered June 7, 1943 (R. 37). On August 3, 1943, the taxpayer filed a motion for a new trial which was overruled on October 4, 1943 (R. 37). Petition for a writ of certiorari was filed December 27, 1943. The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939.

QUESTION PRESENTED

Whether certain oils sold by the taxpayer and used in the machining of metals are "lubricating oils" and hence subject to the tax imposed by Section 601 (c) of the Revenue Act of 1932.

STATUTES AND REGULATIONS INVOLVED

The pertinent portions of the applicable statutes and regulations are set forth in the Appendix, *infra*, pp. 10-13.

STATEMENT

The special findings of fact of the Court of Claims (R. 23-33) may be summarized as follows:

Petitioner, a corporation engaged in the manufacture and sale of oils used in metal cutting, sold to its subsidiary, the Clark Oil Company, during the period June 1935 to November 1938, certain oils known as "Elaine Oil" and "Clark's X Cutting Oil" (R. 23).¹

These oils are commonly known as "cutting oils;" the "Elaine Oil" is a fatty acid derived from lard oil; "Clark's X Cutting Oil" is compounded by adding sulphur and chlorine together with animal fat to a mineral oil base (R. 27). In machining of metals cutting oil is applied under

¹ Appropriate agreements have been entered into between the plaintiff and the ultimate vendees to whom petitioner's subsidiary sold the oil under which it was agreed that the petitioner should file and prosecute a claim for refund and that any credit or refund resulting therefrom should inure to the benefit of the vendees. Consent to this procedure has also been obtained from the Clark Oil Company. (R. 25.)

pressure to the workpiece and the cutting tool through jets directed at the area where the cutting occurs. The jets are opened immediately before the cutting begins and the oil continues to drench the work and the tool throughout the entire operation. Dependent upon the type of work, the quantity of oil ejected varies from 10 to 80 gallons per minute. (R. 31.)

The functions served by the cutting oils are: (1) to cool the workpiece, thereby preventing distortion, and cool the tool, thereby increasing its life; (2) to serve as an anti-weld or anti-seizure substance whereby friction is reduced between the workpiece and the tool, and the chip and the tool; (3) to wash away the chips or cuttings; and (4) to prevent rust and corrosion (R. 31).

The second of these functions of cutting oils, that of serving as an anti-weld or anti-seizure substance, is recognized as one of the important primary functions of cutting oils. This function may be technically described as follows: Metal surfaces are normally covered with films, of molecular thickness, which are sometimes referred to as "adsorbed films." Both the surface of the tool and the surface of the workpiece are covered with this film before the cutting operation begins. Freshly ruptured metal is in a nascent or chemically clean state, and any nascent surface, because of its unsatisfied molecules, is in an extremely active condition. As the cutting operation advances, the surface of the tool encounters the

nascent surface of the workpiece which, because of its active condition, progressively robs the surface of the tool of its adsorbed film, thus tending to produce another nascent surface. When two such surfaces come in contact, adhesion or seizure develops, as it is the normal reaction for two chemically clean surfaces to weld or seize and build up frictional resistance. The cutting fluid prevents such seizure or welding and reduces or relieves the resulting friction. (R. 31-32.)

The pressure between the tool and the workpiece is high, as are the temperatures generated. Mineral oil alone will not withstand such pressures and temperatures, except possibly momentarily. (R. 31.) However, in the use of cutting oils, the sulphur and chlorine additives exert their influence when the pressures or temperatures decompose the mineral base oil, through a chemical reaction with the chip metal and tool face, and thus the adsorbed film is restored or supplied through the formation of new compounds such as iron oxides or iron chlorides having a shear strength less than that of the metal which is being cut (R. 32).

The above type of lubrication is generally recognized in the lubricating field as "extreme pressure lubrication." This type of lubrication is used in the hypoid differential gears of automobiles, where high pressures prevail. (R. 29.)

In a broad general sense a lubricant is any material which tends to reduce friction between moving parts. This, in substance, is the dictionary definition of lubricant, which definition also includes "a cutting lubricant." In its simplest form lubrication operates hydrodynamically through the injection of a fluid film of oil between two relatively moving parts to prevent metal to metal contact. This type of lubrication is almost, if not entirely, mechanical or physical, rather than the result of chemical reaction as in the case of extreme pressure lubrication. (R. 28-29.)

Many large manufacturers of cutting oil advertise their products as "lubricants" and described their lubricating qualities. In some instances these manufacturers indicate that their cutting oils lubricate by fluid film lubrication, and others explain the operation of their products by analogy to extreme pressure lubricants. (R. 32-33.)

For the period June 1935 to December 1938, both inclusive, petitioner duly filed excise tax returns covering its sales of oil to ultimate consumers, including the sales of the "Elaine Oil" and "Clark X Cutting Oil," and paid the tax shown due thereon which was computed at four cents a gallon, the rate of tax provided in the revenue statutes as a tax on lubricating oils (R. 23-25). Claim for refund of the taxes paid on the last two oils mentioned was duly filed and was

rejected by the Commissioner of Internal Revenue on October 19, 1939 (R. 25-27). The petition in the Court of Claims was filed February 13, 1940 (R. 1).

Upon the foregoing facts the court below held that petitioner was not entitled to recover the taxes so paid and dismissed the petition, rendering judgment in favor of the United States (R. 33).

ARGUMENT

The only question in this case is whether the oils manufactured and sold by the petitioner are lubricating oils within the meaning of Section 601 of the Revenue Act of 1932 (Appendix, *infra*, p. 10). The term "lubricating oils" is not defined in the statute. Article 40 of Treasury Regulations 44 (Appendix, *infra*, pp. 11-12) provides that the term "lubricating oils" includes all oils which are sold as lubricating oils and all oils which are sold or used for lubrication. The regulation is not materially different from Article 11 of Regulations 44, as amended July 16, 1932, by T. D. 4339 XI-2 Cum. Bull. 446, less than a month after the original regulation on lubricating oils to which petitioner refers was promulgated. A ruling issued in 1932, S. T. 505, XI-2 Cum. Bull. 448 (Appendix, *infra*, pp. 12-13), holds specifically that cutting oils and water soluble oils used in cutting and machining operations on metals are taxable as

lubricating oils. This contemporary administrative construction of the statute is entitled to great weight in determining the meaning of the statutory language (*Brewster v. Gage*, 280 U. S. 327; *McCaughn v. Hershey Chocolate Co.*, 283 U. S. 488). This ruling has been followed consistently since it was made. There is thus no merit to the petitioner's contention that administrative construction of the statute has not been uniform and is not entitled to any consideration.

Neither the regulation nor the ruling is in conflict with the statute. As petitioner points out (Pet. 11-12), statutory language should be given its plain and ordinary meaning (*Lynch v. Alworth-Stephens Co.*, 267 U. S. 364). A dictionary definition (R. 28), which presumably states such meaning, describes "lubricant" as a substance possessing such properties that it will, when interposed between moving parts of machinery, make the surfaces slippery and reduce friction; it defines a cutting lubricant as a lubricant or cutting compound. The court below in its findings (R. 29) has described several types of lubrication, such as boundary or border lubrication, thin film lubrication, and extreme pressure lubrication. Surely the term "lubricating oils," as used in the statute, would, in normal usage, include oils used for all these various types of lubrication and would not be confined, as petitioner contends (Pet.

8, 11), merely to oils used in automobile engines or lawn-mowers.²

There can be little question but that the oils manufactured and sold by the petitioner were in fact used for lubrication. The court below found (R. 33):

The substances, the taxes on which are here in question, were oils. As used, one of their principal purposes was to prevent friction or adhesion between the surfaces of metal cutting tools on the one hand and the pieces of metal which are being cut by those tools, and the chips or shavings which are cut from those pieces, on the other. This prevention was lubrication and the oils used to accomplish it were lubricating oils.

This finding is fully supported by the other evidentiary findings to which petitioner raises no objection. Petitioner's contention that the lubricating function is not in any respect "sufficient quantitatively to warrant taxability" (Pet. 13) is without merit. The court below found that one of the primary functions of cutting oils is to serve as an antiweld or antiseizure substance whereby friction is reduced between the workpiece and the

² H. Rep. No. 708, 72d Cong., 1st Sess., p. 34 (1939-1 Cum. Bull. (Part 2) 457) does not suggest that Congress intended to limit the tax to such oils. The bill in the form in which it was introduced into the House provided for a tax on lubricating oils of certain grades (see S. Rep. No. 665, 72d Cong., 1st Sess., p. 43 (1939-1 Cum. Bull. (Part 2) 496), and the statement in H. Rep. No. 708 refers to that bill.

tool, and the chip and the tool. Such a function, as fully described in the findings, constitutes lubrication, and is known in the lubrication field as "extreme pressure lubrication." Since this is one of the important functions of cutting oils, the court's holding that these oils are lubricating oils is clearly correct.

CONCLUSION

There is no conflict and the decision below is correct. Therefore the petition should be denied.

Respectfully submitted.

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